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The Normativity of Law in Law and Economics

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Abstract

The Normativity of Law in Law and Economics Péter Cserne* 1. Introduction This paper is about some theoretical and methodological problems of law and economics (economic analysis of law, EAL). More specifically, I will use game theoretical insights to answer the question, relevant both for law and economics and legal philosophy, how should a social scientific analysis of law account for the normativity of law (the non-instrumental reasons for rule-following) while retaining the observer's (explanatory or descriptive) perspective. The goal is to offer a constructive critique of both traditional law and economics scholarship and mainstream analytical legal philosophy (the "Jurisprudence of Orthodoxy", see Leith and Ingham, 1977) in this respect. I will try to find out what EAL has to do with the "internal aspect of law", i.e. the fact or the claim that law provides specific reasons for action, in order to successfully challenge mainstream legal theory. EAL can be conceived either as a (consequentialist) normative legal philosophy, as an explanatory/descriptive theory about law (rational choice theory applied to law) or as a set of propositions for legal reform (legal policy). In this paper I will concentrate on the second, explanatory branch. In this second sense, EAL seeks to explain, first, how law influences human behaviour by changing incentives (law as explanans) and, second, to analyse legal (and possibly non-legal) rules as the outcome of individual actions (law as explanandum). This explanatory/descriptive approach has to confront a clear and central problem, often raised as a (self)critique of standard EAL: its inability or inadequacy to deal with the internal perspective on law. In fact, even if this approach has several more or less sophisticated versions what seems to be common to all of them is to treat legal rules (rule-following) instrumentally. Thus the case of rule-guided behaviour is either included in these theories in an ad hoc manner or is missing altogether. On the other side, contemporary analytical legal philosophy which is (at least in the English-speaking world) generally considered as a branch of practical philosophy, usually treats legal rules as specific non-instrumental reasons for action. In this view, even if empirically there are different motives why people obey the law (including conformism, fear of sanctions, etc.), the nature of law is defined by this specific reason, while the further motives are not reasons in a genuine sense for compliance with the law. Now, in order to be taken seriously as an explanatory legal theory, EAL has to account for this feature i.e. that law offers reasons for action, and to answer (or at least take side in the current philosophical debate on) some fundamental questions about the normativity of law. These questions are both conceptual/analytical ('What is the conceptual difference between regularity of behaviour and rule-following?', 'What does it mean to follow a rule?') and explanatory ('Why people obey the law if they do?'). At the same time, in order to be taken seriously as sound social science, EAL has to stick to the methodological principles of rational choice theory as explanatory social science. In the

following I shall enquire whether EAL can fulfil this double challenge. One consequence of these methodological principles should be emphasised right at the beginning. The normative or justificatory question, central to mainstream analytical legal philosophy conceived as a part of normative practical philosophy, 'Is there a (moral) duty to obey the law?' should remain outside the scope of this paper (and in general, explanatory/descriptive EAL). But the moral or prudential standpoint of the participants who face this question in some form should, of course, be recorded and included in the analysis as an object of explanation. To repeat, I shall be speaking about EAL throughout only in the second sense as an explanatory enterprise. As a different enterprise, it might be possible to work out a full-fledged normative legal philosophy as a version of EAL, based roughly on welfarist (consequentialist) principles, which would have to answer that justificatory question. But this prospect doesn't concern me here.1 In the last decades serious efforts have been made within rational choice theory (especially game theory) to deal with norms both as explananda and as explanantia. In these analyses norms are often denoted more specifically as 'social norms' and considered explicitly as non-legal, i.e. in contradistinction to legal norms. As it will be clear, these models are still highly relevant for my purposes. In part, but not only because the mechanisms exposed in these rational choice models are general enough to be applicable to legal rules too. My question is now, whether the incorporation of these results of rational choice theory in EAL makes it possible to approach the abovementioned basic problems of legal theory in a new way. In a broader perspective it might be possible that also the gap between explanatory social science and normative practical philosophy can be bridged via evolutionary game theory, especially the indirect evolutionary approach. The structure of the paper is the following. Section 2 presents how rule-following is modelled in standard EAL scholarship. Section 3 is about the jurisprudential meaning, importance and explanations of the normativity of law. Instead of the detailed analysis of jurisprudential and legal philosophical issues related to the normativity of law I will restrict myself to sketch the most characteristic standpoints. Section 4 overviews rational choice models of norms and normativity and discusses some features of the legal system in view of the previous insights. This section is intended to be systematic (maybe at some price of details and originality) but is evidently far from exhaustive. Section 5 concludes.

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1. Introduction

This paper is about some theoretical and methodological problems of *law and economics* (economic analysis of law, EAL). More specifically, I will use game theoretical insights to answer the question, relevant both for *law and economics* and legal philosophy, how should a social scientific analysis of law account for the normativity of law (the non-instrumental reasons for rule-following) while retaining the observer's (explanatory or descriptive) perspective. The goal is to offer a constructive critique of both traditional law and economics scholarship and mainstream analytical legal philosophy (the "Jurisprudence of Orthodoxy", see Leith and Ingham, 1977) in this respect. I will try to find out what EAL has to do with the "internal aspect of law", i.e. the fact or the claim that law provides specific reasons for action, in order to successfully challenge mainstream legal theory.

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This explanatory/descriptive approach has to confront a clear and central problem, often raised as a (self)critique of standard EAL: its inability or inadequacy to deal with the *internal perspective* on law. In fact, even if this approach has several more or less sophisticated versions what seems to be common to all of them is to treat legal rules (rule-following) *instrumentally.* Thus the case of *rule-guided behaviour* is either included in these theories in an *ad hoc* manner or is missing altogether.

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Now, in order to be taken seriously as an explanatory legal theory, EAL has to account for this feature i.e. that law offers reasons for action, and to answer (or at least take side in the current philosophical debate on) some fundamental questions about the normativity of law. These questions are both conceptual/analytical ('What is the

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conceptual difference between regularity of behaviour and rule-following?', 'What does it mean to follow a rule?') and explanatory ('Why people obey the law if they do?'). At the same time, in order to be taken seriously as sound social science, EAL has to stick to the methodological principles of rational choice theory as explanatory social science. In the following I shall enquire whether EAL can fulfil this double challenge.

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2. What is wrong with EAL and how to "save" it?

Despite the complaints that "much of law and economics scholarship is strikingly un-self-critical" (Hanson and Hart, 1996: 328), it would be very easy to enumerate hundreds of articles by law and economics scholars offering thoroughgoing and fundamental critiques of their own discipline. There are different types, levels and styles

[1] For an excellent overview of the recent philosophical standpoints on the duty to obey the law see Green, 2004. On the relation of *Law and Economics* to legal scholarship in general, see Symposium, 2004.

of the objections.[2] In the following I shall try to avoid *naiveté* and moralising and be constructive in drawing attention to possible solutions to the problems detected.

2.1 EAL as rational-choice sociology of law

As mentioned in the Introduction, the economic analysis of law can be conceived either as a (consequentialist) normative/evaluative legal philosophy (EAL1), as an explanatory/descriptive theory (sociology) of law (rational choice theory applied to law; EAL2) or as a set of propositions for legal reform (legal policy, *Rechtspolitik*, EAL3). What I mean by EAL1 as legal philosophy is a partly conceptual and partly normative analysis dealing, in part, with the question how to justify efficiency as the main guiding principle of law. By EAL3 as legal policy is meant a more or less coherent system of proposals for reforming legal rules in order to fulfil certain hypotethically or tacitly accepted normative criteria of which efficiency is the most important.[3]

For several reasons, it seems the most fruitful to concentrate in the following on the second, explanatory branch. Speaking about rational choice theory and more generally the methodology of the social sciences in EAL2, I refer to the approach elaborated most convincingly by Jon Elster. Especially I mean the methodological stance that he shares in common with such fellow sociologists as Raymond Boudon, James S. Coleman, Hartmut Esser, Siegwart Lindenberg, Karl-Dieter Opp and others. Their most important common premises are methodological individualism, non-teleological view of society, and the heuristic primacy of rationality. Following Coleman, the theory is based on three explanatory links: macro-micro, micro-micro, micro-macro (the "bathtub" form) as it seeks to explain social phenomena on the macro level by using individualistic mechanisms. EAL2 is a part of this "grand theory".

2.2 Traditional EAL on rule-following

Standard economic models usually follow O. W. Holmes (1897) in adopting a bad man's view on law.[4] That is, they treat legal rules not as *obligations* but as *incentives* or prices. This view is clearly reflected in the EAL arguments for "the efficient breach of contract" (see Cserne, 2003) and is present in other legal areas as well. In this view, people (should) obey the law as long as they are deterred by sanctions:

"Managers do not have an ethical duty to obey economic regulatory law just because law exists. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order

[2] See, e. g. Friedman, 1998. For a typology of usual external critiques, see Katz, 1998: ch. 8. For a succint overview of the most important normative objections see Spector, 2004: 351–354.

[3] I have elaborated on this classification elsewhere (Cserne, 2004: 300–302), discussing why the usual dichotomy of normative and positive analysis is incomplete and imprecise in several respects. For different classifications (also diverting from the usual normative/positive dichotomy) see Kornhauser, 2001 and Ogus, 2004.

[4] "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." Holmes "The Path of the Law" (1897), cited in Cooter, 2000a: 375 n.12. Richard Posner considers Holmes a predecessor of EAL in several respects. See Posner 1992, 1998.

to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so."[5]

Even if the *normative* version of this view is less popular now, standard EAL considers sanctions as prices, it imputes to citizens only prudential reasons for compliance with the law, briefly it adopts an external perspective on law. This bad man's view is in general not a *descriptively* correct model of human behaviour in face of law and its predictions are often contradicted by empirical findings, both in surveys and in experiments. But as we shall see, there are numerous contexts where it is not far from being realistic and in a certain respect it is close to recent jurisprudential views.

A further characteristic of standard EAL could be called *legal centralism* (Posner, 2000: ch. 1, Ellickson, 1998: 541). This is the view that law is the only relevant normative rule to be modelled in EAL. Non-legal mechanisms of co-operation are often neglected. Enacted law is supposed to modify the behaviour of the agents as changes in market prices do, while law is enforced in an anonymous way. "By exaggerating the reach of law, [EAL scholars have] underrated two other major sources of order: internally enforced norms (socialisation) and externally enforced norms. In addition, they paid too little heed to the human pursuit of status." (Ellickson, 1998: 539)

Here, again, it should be noted that in a number of contexts the anonymity of agents and the lack of reputation effects is a realistic assumption, but in others (e.g. in village societies) it is clearly unconvincing (cf. Andreozzi, 2002: 407–8, Platteau, 2000: 246). We come back to the question of the interaction of legal and non-legal norms in section 4.2.1.

Another general but rather implicit assumption of the standard version of EAL is, interestingly, that "public officials in general and judges in particular, are conscientious. Judges thus enforce the legal rules as they are announced, regardless of the judge's own view of the desirability of the legal rule or its impact on her personally." (Kornhauser, 2001: sec. 1.) True, there are models on "what do judges maximise?" and Posner in his jurisprudential works outlined his own theory of adjudication too (Posner, 1990).[6] Still, when EAL scholars (or economists, more generally) work on policy analysis (e. g. the comparison of negligence and strict liability regimes in tort law) they usually have in mind a benevolent lawgiver who is waiting for their advice and willing and able to enforce the policy recommendations through the judiciary or a loyal bureaucracy (for a sharp critique of this view see Sugden, 1986: 6–8). To note, this perspective is completely different both from the public choice and the constitutional economics view on law and state (politics).

[5] Cited from Easterbrook and Fischel in Cooter, 1984: 1523 n. 2.

[6] In one sense, Richard Posner writes from the participant perspective, i.e. as an American federal appellate judge (in Posner, 1990). In another sense, he wants to account for this judge-perspective from outside, i. e. to explain from a given preference profile and institutional constraints what and how judges maximise when they behave as judges. The two perspectives don't seem fully compatible. He attempts to solve this by positing that his theory of adjudication is a different enterprise than EAL. And according to this theory the judge has to use other principles (most notably corrective justice) along with wealth maximisation in deciding "hard cases" (see Cserne, 2004).

2.3 *Ad hoc* and quasi-instrumental explanations of normativity of law

As seen, standard EAL models treat legal rules (rule-following) *instrumentally*. In more complicated models,[7] this basic view is

(1) either sustained in a subtle way, as e. g. by Eric Posner who explains co-operative behaviour in a repeated-game framework as a signalling mechanism (roughly, people comply with rules in order to sustain their reputation for trustworthiness, Posner, 2000), or
(2) alternatively, the model is modified to include the case of *rule-guided behaviour* in an *ad hoc* manner, e. g. through a redefinition of preferences, i.e. attaching utility to norm-conformity itself (Rabin 1993, for a critique see Ambrus-Lakatos 2002), or
(3) by simply assuming a certain proportion of agents to follow norms in a committed way, interacting with uncommitted others (e.g. Cooter, 1997, 1998, 2000b).

These models are very different in details (actually, this is one problematic aspect of making *ad hoc* assumptions) but similar in spirit. The sympathetic interpretation of these solutions is that they explain law-abiding behaviour as enforced by non-legal mechanisms (social norms) which in turn are sustained by those who care about their future benefits and thus their reputation (have a relatively low discount rate). All this is in accord with standard assumptions of rational choice theory. The less sympathetic interpretation (especially of type (1) models) is that "it is more important to appear good than to be good", i.e. morality is a mirage or at least a discourse that is reducible to something more fundamental and essentially non-moral. But why should this be a problem?

One reason is that, as some argue, there is a *categorical* difference between moral and non-moral preferences or moral and prudential reasons for action. An important aspect of the distinction between norm-following and outcome-oriented action (to go on with these more or less synonymous dichotomies) has been highlighted by Jon Elster when discussing John Dunn's argument about "the relation between virtue and self-interest" (Elster, 1981: 8):

"the prospect of gains might be a sufficient motive for someone setting out to become virtuous (though it might also prove an obstacle to that goal), but it cannot be a motive for being virtuous (though it can, of course, be a motive for appearing to be so)."

Some EAL scholars see this difference, take it seriously but cannot explain it. For example, even 20 years after his seminal article which made clear the basic difference between "Prices and Sanctions" in influencing human behaviour (Cooter, 1984), and after several further illuminating articles modelling non-instrumental norm-following Robert Cooter includes the possibility of non-instrumental law-abiding in their textbook chapter on the economic analysis of criminal law (by calling it "civility") without being able or willing to handle it analytically more thoroughly. He simply states: "The economic models of crime that we have been discussing assume that actors decide whether to obey the law based on a calculus of self-interest. In fact, many people obey the law from intrinsic motivation and respect." (Cooter and Ulen, 2004: 466) What is thus not clear (cf. Cooter, 2000a: 376–379 for "self-criticism"), whether and how this "intrinsic motivation and respect" can be *explained* in a rational choice model. We come back to the possible solutions to this problem in section 4.1.

[7] For references to eight different attempts to "enrich classical law and economics" see Ellickson, 1998: 546–550.

2.4 The Meaning of Money

Recent progress in EAL is related to the similarities and differences of prices and sanctions in another way too. More precisely, here the implied idea is questioned that both a fine (for violation of the law, an illegal behaviour) and a tax (on the same action, now considered as legal behaviour) have the same effect on the frequency of a given action that is punished or taxed.

At first glance, the legal(istic) and jurisprudential distinction of punishment and taxation seems to be straightforward (Hart, 1994: 39)[8] but it is far from evident that this has a real impact on the behaviour of the citizens. For example, the payment due for parking in a forbidden zone (or time) may be considered and can be legally designed either as a fine or a price. We can imagine that below or above a certain amount, the "name" of a legal category makes only a semantic difference and does not matter for the behaviour of citizens looking for a parking lot. Or, even if there is an attitudinal difference on the micro level, it may be unobservable, at least in a partial equilibrium model, on the macro level (in the pattern of parking in a given territory). From the calculative point of view of the norm-subject, both payments count as a price increase for the action (the deterrent effect can be measured by the expected value of the payment if we assume risk neutrality). In the traditional EAL logic, it is not clear how could there be any observable difference in behavioural responses, at least on the macro level. Still if there is a difference, how can this be translated to different attitudes of norm-subjects?

Recent empirical research confirms that the simple fact of declaring a behaviour illegal has some deterrent effect. *Labelling matters*, especially in criminal law (Kahan 1998). *Formally*, this is a special case of the framing effect in terms of behavioural economics (from the orthodox rational choice perspective it is generally considered as an "anomaly", a deviation from the standard *homo oeconomicus* model). *Substantially*, it is an example of the general sociological insight that money may have different *meaning* according to the social context in which it is extracted or paid (Zelizer 1994, 1998).

If these results about the importance of labelling and social meaning of law turn out to be robust and thus get included in EAL, it also means that at least one usual assumption behind non-market economics ("the imperialism of economics", see Becker 1976, Radnitzky – Bernholz 1987, Ramb – Tietzel 1993, Cserne 2000) has to be reconsidered. Namely that one, according to which human behaviour can be modelled in *every* social context (e.g. on the market and in the family) essentially in the same (maximising, self-interested) way.[9] It may turn out as well that what counts as 'economic' cannot be defined in a completely *formal* way (following L. Robbins) but has some *substantive* meaning too (in accord with K. Polányi's view).

[8] Actually, even the legalistic categorisation is unclear. For examples of fuzzy borderlines between taxes, charges, prices and fines in Hungarian law and an attempt to clarify their differences based on both legal and economic arguments, see Cserne, 2001.

[9] As George Stigler put it: "I arrive by a devious route you observe at the thesis that flows naturally and even irresistibly from the theory of economics. Man is eternally a utility-maximizer, in his home, in his office — be it public or private — in his church, in his scientific work, in short, everywhere." (Stigler, 1982: 35)

To sum up, in standard EAL models, citizens comply with legal rules for prudential (instrumental, consequentialist) reasons. At the same time, it is often implicitly assumed that legal officials act conscientiously in their roles, out of respect for law or following other non-self-regarding principles. In the next section we shall see how this view can be judged in light of jurisprudential theories on the normativity of law.

3. The normativity of law in legal philosophy and jurisprudence

At least in the English-speaking world[10] (analytical) legal philosophy has been considered in the last decades as a branch of practical philosophy, along with ethics and political philosophy. What these branches have in common is the interest in conceptual and normative questions about the right conduct, about rights, obligations, and duties of the individual in isolation or in different communities, to put it simple, in the question: 'What should be done?' 'What is good to be done?' (Wallace 2003). The normativity of law counts as a basic problem within this paradigm of legal philosophy.[11] Despite the inner controversies, a great number of legal theorists share a common terminology, and work on similar problems.

3.1 Basic concepts and the compatibility of jurisprudence and rational choice theory

Without going into details, it seems necessary to overview briefly the basic concepts of this practical philosophical paradigm. As will be clear, some of these terms have already been used above. Consequently, until now it may have seemed evident that jurisprudence and rational choice theory (including EAL2) are not incompatible. What is more, in this paper I have implicitly made the assumption that these theories can mutually benefit from each other. There are, however at least two possible objections against this project. The first is concerned with the different possible perspectives of legal theories (see section 3.1.3). The second with the different interpretations of (practical) 'reason' (see section 3.1.4).

[10] It is interesting to note that the differences in legal and philosophical background, research focus, and argumentative style between English-speaking and Continental legal theory is still considerable. This can be observed in an exemplary way in an article of the German sociologist Michael Baurmann (2000). In this paper he tries to work out an empirical (behavioural) reduction of normativity by using a basically Kelsenian (or Austinian) view of legal theory (without the sophistication thereof) as a departure point. By concentrating on the norm as an expression of the want of a person in power he seems to be among others completely unaware of the current Anglo-Saxon paradigm, i. e. Herbert Hart's fundamental critique of an *imperative theory of law* (Hart, 1994: ch. 3–4) and the embeddedness of legal theory in practical philosophy. These would put Baurmann's whole enterprise in another light, not to say make it superfluous. I think, this example not only illustrates dramatically that the "cultural clash" within the legal academia easily goes over into more "international" disciplines like sociology. But the case is most remarkable because it concerns a sociologist who otherwise has been applying rational choice theory brilliantly in his previous work on norms (Baurmann 1996).

[11] See, e. g. Karlsson 2001, Postema 1987, Redondo 2000; from an EAL perspective Kornhauser 1999.

3.1.1. Norm, rule, and law

'Statistical' and 'sociological' definitions of norm which concentrate on the regularity of behaviour within a given group of individuals (e.g. Hechter and Opp, 2001) lack the element of normativity (obligatoriness, ought-element) from the definition of norms. Analytical legal theory clearly adopts the 'philosophical' sense, which treats norms as prescriptions. For the present purposes, we treat both rules and laws as norms.

3.1.2. Internal and external aspect of rules

According to a now classical distinction of Herbert Hart, one of the defining features of rules (in contrast to habits or mere regularities of behaviour) is that they can be viewed both from an internal and an external aspect (Hart, 1994: 55–56). The internal aspect implies the use of a normative language, a "reflective critical attitude", i. e. that the rule is used as a standard to evaluate and criticise the behaviour of all persons to whom it applies. As for the external perspective, it is concerned with the rules "merely as an observer who does not himself accept them." This external point of view can mean two different things. First, "the observer may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which they are concerned with them from the internal point of view." Alternatively, it can refer to "the position of an observer who does not even refer in this way to the internal point of view of the group", "is content merely to record the regularities of observable behaviour" (Hart, 1994: 89).

Further analyses have shown that this categorisation is not complete. There are several other possible perspectives on normative phenomena (rules, law). One of them, further acknowledged also by Hart as important, is called the detached legal point of view (Joseph Raz) or the hermeneutic view (Neil MacCormick) and refers to the perspective of somebody who uses the normative language (rights, duties, obligations, etc.) without being (morally) committed to the normative phenomenon. This view can be represented by the characteristic semantic form: "According to the law, A has to do X."

3.1.3. Observer and participant perspective

This distinction, although strongly related to the former one between internal and external views, is used here to refer to alternative meta-theoretic standpoints in jurisprudence about the status of legal theory. The debate is whether legal theory should be completely outside or partly within the law it seeks to understand. Observers usually construct "non-legal", "scientific" theories *on* or *about* law while participants, following Aristotle construct "lawyer's theories" *in* law, *from within* law as a human practice (form of life).

One of the objections against the use of rational choice theory in jurisprudence is related to this duality of perspectives. As indicated in the Introduction, I assume in this paper that it is possible to build up a "descriptive and general legal theory" in the

Hartian sense (Hart, 1994: 240–241). Of course this assumption does not rule out that the "best possible version" of this sort of theory may largely diverge from either Hart's or any other current theory in their details. And indeed, the objection is not against rational choice theory in specific but quite generally against descriptive (sociological) approaches or the possibility of an observer perspective.

What is not evident (or questionable) for critics (e. g. theorists like Ronald Dworkin, see Dworkin 1987) is that it is possible to build up a legal theory *without* adopting the participant perspective, to follow a methodology which is *not* interpretive in the Dworkinian sense. But even at first glance (and I shall not go into details here) this objection is not well founded, for the following reason. The view on the exclusive legitimacy of the participant perspective not only questions the possibility of historical and comparative research (how to find *the* adequate participant perspective for these?) but at the bottom line it would imply that social science *qua* science is not able to analyse normative phenomena. And this seems to me a rather absurd conjecture.

To answer the possibility of an observer perspective to the assertive doesn't mean, however that it is the only or even the theoretically more fruitful, more interesting etc. perspective. We don't have to decide *this* latter question here. Our own methodological standpoint doesn't question the legitimacy of others, if they are coherent. E.g. this is the case with John Finnis who acknowledges that the sociological, descriptive accounts are valuable even for a theory of natural law, if only with subordinated importance (Finnis, 2002: 12–13).

To note, the duality of perspectives does not coincide with, actually cuts through the traditional dichotomy between positivist (conventionalist) and naturalist legal theories (Postema 1987). It is possible that these theories have to compete *within* both perspectives. What cannot be accepted, however, is the objection that the non-evaluative point of view is a logically or practically inadequate, unsound or illegitimate theoretical perspective.

3.1.4. Instrumental vs. non-instrumental (prudential vs. moral) reasons for rule-following

Clearly, motivations for obeying the law may be very different and the relative importance of the types of motivation is an empirical question. Still, as noted in section 2.3. some theorists consider the distinction between instrumental and non-instrumental reasons categorical, even if both can be modelled within rational choice theory.[12]

A related problem concerns again the compatibility of jurisprudence and rational choice theory. Ultimately related to the first objection, it is about the different meanings of the terms ‚reason' and ‚rationality' in practical philosophy. The problem involved here can be summarised like this. An influential current type of natural law theories (e.g. Finnis 1980, 1992, 2002, George 1999) and several other scholars within the analytical jurisprudential paradigm follow such an interpretation of practical reason that is explicitly opposed to the concept of rationality used in EAL and rational choice theory in general (see Wallace 2003).

[12] For example, Jon Elster models non-moral reasons as a second filter of possible actions or as lexicographic preferences, see section 4.2.2.

As they argue, rational choice theory speaks both about rationality and choice only in a technical sense, concentrating on situations where both true reasons and genuine choices are absent (Finnis 1992: 140–1, 146–7, 150–1). Acting on reasons in the full and true sense is, in their view, acting undeflected by emotions and feelings (desires), thus potentially against them. EAL and rational choice theory, on the other side seems to agree with Hume that "reason is, and ought only to be the slave of the passions" (see George 1999: 287–299, esp. 288–290).

This is not the place to evaluate the philosophical merits of the problem involved but let me make only two remarks. I think that there are several possible ways to reconcile (deconstruct) the difference between the two approaches. One is to turn to the distinction, first used by another 18th century moral philosopher Francis Hutcheson, between 'exciting' (motivating) and 'justifying' reasons (see MacCormick 1987: 111–112, Holton 1998). Furthermore, the 'rich' concept of reason that these critics adopt, even if philosophically fruitful is in my view less fruitful in empirical social science (which EAL2 based on rational choice theory finally purports to be). Here, the operationalisation of concepts is needed which is much more problematic in case of the non-instrumental concept of rationality. As we will see in section 4.2, these two arguments are related to each other as well as to the problem of normativity of law, to which we now turn.

3.2 The normativity of law

Normativity as the specificity of rules cannot be understood from the bad man's view. "Where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions." (Hart, 1994: 84)

Current analytical legal philosophy treats legal rules as specific non-instrumental reasons for action (see, e. g. Finnis 1992, Raz 1990, Schauer 1991). In this view, even if empirically there are different motives why people obey the law, the *nature* of law, including its normativity is defined by some specific reason while the possible further motives for conformity are not reasons for compliance with the law in a genuine sense. True, opinions on the exact nature of the normativity of law diverge within legal philosophy. In what follows, I shall only give a brief overview of the most influential views.[13]

A complete philosophical account of the normativity of law comprises both an explanatory and a normative-justificatory task. The explanatory task consists of an attempt to explain how legal norms can give rise to reasons for action, and what kinds of reasons are involved. The task of justification concerns the elucidation of the reasons people *ought* to have for acknowledging law's normative aspect. In other words, it is the attempt to explain the moral legitimacy of law. As noted in the Introduction, I shall concentrate on the first of these two questions, i. e. the different theories about the nature of law that purport to explain what the normativity of law actually consists in.

Early representatives of the legal positivist tradition, such as Bentham and Austin, assumed that the normativity of law resides in its *coercive* aspect, i. e. that law enforces its practical demands on its subjects by means of threats and violence. Concerning the

[13] In this overview I closely follow Marmor 2001.

relative importance of sanctions for the ability of law to fulfil its social functions, Kelsen maintained that the monopolisation of violence in society, and the law's ability to impose its demands by violent means, is the most important of law's functions in society. Legal positivists in the 20th century, like Hart and Raz, claim that coercion is neither essential to law, nor, actually, pivotal to the fulfilment of its functions in society. As noted above, Hart emphasised the reason-giving function of rules. Hart's fundamental objection to the predictive model is actually a result of his vision about the main *functions of law* in society, holding, contra Austin and Kelsen, that those functions are not exclusively related to the ability of the law to impose sanctions. To answer the question of *why* people should regard the rules of law as reasons or justifications for actions, we have to look at the functions law should or actually does serve. We come back to this in section 4.2.

One of the most influential approaches to the normativity of law is Joseph Raz's theory of authority, which relies in several respects on Hart's theory (Raz 1990). The basic insight of Raz's argument is that the law is an authoritative social institution. The law is not only a *de facto* authority but claims also *legitimate* authority. Even if any particular legal system may fail to fulfill this claim, law is the kind of institution that necessarily claims to be a legitimate authority. The essential role of authorities in our practical reasoning is to mediate between the putative subjects of the authority and the right reasons that apply to them in the relevant circumstances. An authority is legitimate only if its putative subjects are likely to comply better with the relevant reasons that apply to them by following the authoritative resolution than by trying to figure out or act on those reasons by themselves.

What kinds of things can claim legitimate authority? Authorities are there to make a practical difference, and they can make such a difference only if the authority's directive can be recognised as such without recourse to the reasons it is there to decide upon. Secondly, for something to be able to claim legitimate authority, it must be capable of forming an opinion on how its subjects ought to behave, distinct from the subjects' own reasoning about their reasons for action. In other words, a practical authority, like law, must be basically personal authority, in the sense that there cannot be an authority without an author. Raz's conception of legal authority requires that the law, *qua* an authoritative resolution, be identifiable on its own terms, that is, without having to rely on those same considerations which the law is there to settle. Therefore a norm is legally valid (i.e. authoritative) only if its validity does not derive from moral or other evaluative considerations about which it is there to settle.

4. Rational choice theory on (social) norms

In the last decades serious efforts have been made within rational choice theory (especially game theory) to deal with norms (both as *explananda* and as *explanantia*). Rational choice models of norms are manifold: some analyse the effect of norms on behaviour, others the interaction between law and non-legal norms. Both treat norms as given. Still others try to explain their emergence. This branch is also diverse. Either a rational reconstruction is given or the process itself is modelled, usually in evolutionary terms. (See, inter alia Barry 1982, Ben-Ner and Putterman 1998, Bicchieri 1990, 1993, 1997, 2000, 2002, Coleman 1990, Ellickson 2001a, 2001b, Elster 1989b, Hechter and Opp 2001, Lewis 1969, Metze, Opp and Mühler 2000, Ockruch 1999, Opp, Hechter and

Wippler 1990, Schotter 1981, Skyrms 1996, Sugden 1986, Ullmann-Margalit 1977, Wesche 2001, Young 1998)

4.1 Rationality, morality, internalisation

As I stressed before, motivations for obeying the law may be very different and the relative importance of the types of motivation is an empirical question. But at least since Max Weber it has been widely accepted in social sciences that the diversity of the empirical motives should not disallow constructing ideal types or models. Further, Frederick Schauer argues (1991) by contrasting prudential and moral considerations for rule-following that the first type of reasons is more important for institutional design. Among these he distinguishes three different sorts of prudential reason: avoidance of sanctions, seek for rewards; simplification of decision; epistemic reason: belief that the rule-giver has superior information on what the agent should do. To be sure, for explanatory purposes we have to take also the moral reasons into account.

There are several ways to enrich the simple rational choice models in order to account for morality, internalised norms etc. In this literature, norms are often denoted as *social* norms and considered as explicitly *non-legal* ones. Sometimes, however, the mechanisms exposed in these rational choice models are general enough to be applicable to legal rules too. Here are some characteristic attempts in this direction.

4.1.1 Leaving internalisation exogenous

As already mentioned in section 2.3, one of the pioneers of this sort of modelling has been Robert Cooter (see, e.g. Cooter 1997, 1998, 2000b). His basic idea is to take the different (moral and amoral) attitudes as given and analyse the dynamics of their relative success in different environments. Some scholars argue that internalisation would mean unfalsifiability in explanation because any type of behavior can be explained as the result of following a putatively internalised but unobservable norm prescribing the observed behaviour (Opp, Hechter and Wippler 1990: 1-2). They therefore stick to explanations based on the interest of individuals, i.e. rationality. Question is, whether this means necessarily instrumentality and self-interest too. There are different ways open.

4.1.2 Value rationality and lexicographic preferences

It is often argued that the assumptions of rational choice theory concerning the individuals' system of preferences cannot be sustained. The formal structure of the problem is roughly the following (see Csontos, 1999: 213–4). According to an important but often hidden assumption of economic theory the preferences of individuals satisfy the so-called *Axiom of Archimedes*. The definition of the Archimedean axiom roughly says that in a choice between bundles with different amounts of goods x and y it is always possible to increase the amount of y by such measure that directs preference toward a bundle with a smaller amount of x. Such

calculation is really "one-dimensional" (Csontos, 1999: 213), where "everything has its price" (Elster, 1984: 126).

There are, however, preference relations in which it is not so. One of the cases where an individual's preferences violate the Archimedean axiom is the so-called *lexicographic ordering*. In case of a lexicographic ordering the preference for a bundle with a smaller amount of *x* cannot be achieved merely through increasing the amount of *y*. That is, "there is no currency (money, power, influence) that could be used to compensate the actor for the decrease in the amount or the value of the other good" (Csontos, 1999: 213 n. 5). Lexicographic preferences are an analytical device to model value rationality (*Wertrationalität*). Human action based on value rationality means action based on lexicographic preferences.

This type of preferences raises both formal and substantial issues. Formally they are not representable in the usual way. But "this does not show that lexicographically governed behaviour cannot be made amenable to rational choice analysis, only that this analysis cannot use the handy tool of the utility function." (Elster, 1984: 125) Substantially, from a rational choice perspective, lexicographically prior values can be interpreted as constraints on decision-making rather than criteria for decision making (ibid.) To be sure, this is the exact opposite of the view of rationality we have seen above by Finnis and R. P. George. Indeed, the relation of instrumental rationality and value rationality is a highly interesting and yet unresolved issue of social sciences (see, e.g. Greve 2003). In Elster's view, when the Archimedean axiom is not satisfied, we are dealing with goods or activities that do not lend themselves to the economic approach but they can represent rational non-economic behaviour (Elster, 1984: 127). It should be noted that this approach models rationality in a parametric (non-strategic) way. The further approaches are based on strategic interactions.

4.1.3 Game-theoretical models, with or without rationality

The basic idea of the game-theoretical models relevant for us is this. Retaining the assumption of rationality but changing the situation (constraints) in which the individuals interact. Here, instead of an impersonal market implicit in usual EAL models of law enforcement (Becker 1976, for a succint version of the traditional EAL view see Polinsky and Shavell, 2000) strategic interaction (game-theoretical situation) is used (Holler 1993, Frey and Holler 1999). Regarding the problem of law enforcement in the practical, legal policy sense (EAL3), this approach also provides policy recommendations, which are, on occasion more promising than the traditional ones or at least prove why the traditional approach is unsatisficing in many respects.

This game theoretical approach can be modified further by the adoption of evolutionary models. Here also we find a multiplicity of approaches and models with at least one thing in common. The problem of rationality comes back in another way. Evolutionary game theory as a supra-individual explanation is sometimes welcomed for explicitly rejecting the assumptions about individual (hyper-)rationality and focusing on learning, imitation and other replicator mechanisms (Skyrms 1996, Young 1998, cf. Platteau, 2000: ch. 1 and 8). There are, however rather convincing arguments that evolutionary models cannot "provide a basis for doing without rationality" (Bunzl 2002). In this perspective the so called indirect evolutionary approach may be interesting (see, e. g. Güth and Napel, 2003: 1–3). The basic idea of the indirect

evolutionary approach is the following. In contrast to other evolutionary models, here the rationality of the players is assumed, what is evolving is the constraints within which they are placed.

Harsanyi claimed that all that is explained in terms of social norms could be explained through use of the conceptual machinery of game theory. Ullmann-Margalit disagrees (1977: 14). Even if adopting game theory in the analysis of norms, she claims that "the framework of the theory of games as a formal discipline is too narrow, and hence inadequate, for an account of the generation of norms" (Ullmann-Margalit 1977: 6), especially because of the multiple equilibria problem, where common cultural background etc. help to find focal points. Thus connotations of games and the contextual details matter (cf. section 2.4 above on social meaning). In order to transcend the debate between Harsanyi and Ullmann-Margalit, the evolutionary approach may be helpful. For example, Binmore (1994, 1998) explicitly deals with multiple equilibria situations as a sort of co-ordination problem regarding *equilibrium choice*. Here we can see the contrast between classical and evolutionary approaches in game theory – the choice of focal points lies outside of the scope of the former but is an *explanandum* for the latter.

4.1.4 Endogenous development of (conditional) morality

A further family of game theoretical models shares the idea of retaining the assumption of instrumental rationality but in a rather sophisticated way. In contrast to (1) changes in external constraints (section 4.1.3), (2) reputation effects or (3) the introduction preference for morality simply by an *ad hoc* assumption (see section 2.3), non-opportunistic behaviour is explicated in these models by self-management, "egonomics", i. e. through an endogeneous process of preference modification by rational individuals (see, e. g. Frank 1987, 1988, Schelling 1978). For example, Raub and Voss present a mechanism where moral preferences (more precisely, those representing an Assurance Game) emerge as the outcome of rational individual choices. Applying standard game theory to the decision on "effective preferences" they model an endogenous development of (conditional) morality by self-interested individuals (Raub and Voss, 1990: 86).

4.2 Progress through distinctions

To profit from these diverse models in enriching EAL's answer to the problem of the normativity of law, we have to make certain distinctions. In dealing with this problem we are directly interested
(1) in norms in general and especially in legal norms but not in the interaction of legal and non-legal ("social") norms as such or the sustainability of co-operation in general or in economic situations (these can be highly relevant for empirically oriented research, but are irrelevant for the analytical or conceptual question of the nature of law),
(2) in the consequences of law being institutional and systemic,
(3) in the motives or reasons of individuals for compliance and not in the emergence of norms.

I shall explain these distinctions in sections 4.2.1–4.2.3, respectively. Finally, in section 4.3 I shall distinguish different types of situations that law regulates. Arguably, these different "functions of law" can be linked to (modelled as) different types of games while each function has potentially a corresponding type of norm which, in turn generates different motives and reasons for rule-following.

4.2.1. Legal vs. social norms

In section 2.3 we have already mentioned the relatively recent but intense interest of EAL scholars for the problem of 'norms', i.e. social (non-legal) norms, and their interaction with law. Although these recent developments in EAL promise important insights in understanding social norms (e.g. Cooter 1997, 1998, Symposium 1996, 1998, Posner 2000), i.e. informal social control, these are, at first glance not directly relevant for the understanding of the normativity of law.

If behaviour is in conformity with law because of compliance with a non-legal norm, the *normative force of law* does not work in this case, even if legal obligations are fulfilled and rights are respected. There are, however, several reasons not to neglect these results.

These contributions are important even for jurisprudence inasmuch as they focus on the interaction of several different normative systems. The central subject matter of legal theory is to define the specificity of law but the functioning of a legal system cannot be understood without due attention to the interaction of different norms. It is a commonplace in the sociology of law that in order to be effective, legal duties have to coincide with the requirements of social norms, in many contexts. Thus, even if this does not question the importance of conceptual analysis and discussion on the sound understanding of the concept of law and its normativity, sociological critiques of legal centralism (Ellickson 1991, 1998, Posner, 2000: ch. 1) have repercussions on legal theory in this narrow, conceptual sense too.

There is another, more formal reason for being attentive to rational choice models of norms. If we want to explain when and why people obey the law *qua* law within a rational choice model, we have to use analytical methods similar to models of norm-following in non-legal contexts. This doesn't rule out the importance of law's specificity, its institutionalised and systemic nature. What sort of difference these do make is to be discussed in the next subsection.

In sum, knowledge about social norms is crucially important for EAL and legal scholarship in general, both theoretically and practically. But it does not answer directly and specifically the questions about the normativity of law.

4.2.2. Officials and citizens. The institutional and systemic character of law

When cursorily discussing the difference between legal and social norms, Elster makes an interesting statement: "legal norms are enforced by specialists who do so out of self-interest: they will lose their job if they don't. By contrast, social norms are enforced by members of the general community and not always out of self-interest." (Elster 1989a: 100) This criterion of distinction is highly controversial (especially with regard to the motives of the enforcers, see below) but it draws attention to an important feature of

legal systems, at least in their modern form. Namely, to the *institutional* character of law, that there is a specialised staff of people who enforce law.

Legal theorists tend to agree (see Hart 1994, Lagerspetz 1995, Postema 1982, Raz 1990) that there is a systematic difference between officials of a legal system and members of the society subject to law (including officials acting in their non-official capacities) with respect to their attitude toward law. This difference is not only empirical but has some analytical consequences. Jurisprudence quite generally holds Hart's view (with slight differences) that as a conceptual minimum, for the existence of a legal system it is necessary that the officials, especially the judges take an internal perspective on law. Thus it is logically possible to speak about an existing legal system (though not an efficacious or a flourishing one) even in case when none of the citizens take the internal perspective but most of them simply obey by adopting the external perspective (the bad man's view).

In this respect, standard EAL as presented in section 2.2 is compatible with mainstream positivist legal theory, especially that of Hart who sees the internal perspective of officials and the conformity of citizens as a conceptual minimum of a working legal system (Kornhauser 2001).

This compatibility becomes, however less straightforward if we look at a more elaborate view on the existence conditions of a legal system (Lagerspetz 1995: 167–174). More specifically we will concentrate on one set of necessary conditions for the existence of a legal system, efficacy. This may contain two different conditions for these two groups of persons (officials and citizens). For both groups we can distinguish four possible basic attitudes, in an increasing strength order: conformity, obedience, acceptance, moral acceptance. Thus there are the following possibilities (Lagerspetz 1995: 168):

(1) Officials conform to the rules of the system.
(2) Officials obey the rules of the system.
(3) Officials accept the rules of the system.
(4) Officials morally accept the rules of the system.

(1') Citizens conform to the rules of the system.
(2') Citizens obey the rules of the system.
(3') Citizens accept the rules of the system.
(4') Citizens morally accept the rules of the system.

In both series, the latter attitudes imply the former (obedience implies conformity, acceptance implies both obedience and conformity, etc.). We can characterise different legal theories as which combination of criteria they accept. E. g. (2) + (1') can be ascribed to Kelsen, while (2) + (2') to Austin. Hart's conceptual minimum requires (3) + (2'), thus no *moral* acceptance is needed according to him. Most of the current controversies in jurisprudence are about the replacement or otherwise of (3) by (4). Without going into details, I note that (4) as a categorical requirement would rule out the possibility of indifferent or critical officials (e.g. a philosophical anarchist judge). At the same time, (3) is compatible with a situation where all officials *pretend* (4), while believing that others *adopt* (4) and subscribe to the official claims of the legal system. This situation may leave room for the difference between exciting (motivating) and justifying reasons for judges, mentioned above (MacCormick 1987: 111–2). Thus, the legal system may work in this way if the *lack* of moral acceptance is *not common*

knowledge. However (3) + (2') is, even in Hart's view, only an extreme limiting case.[14] Lagerspetz's arguments seem plausible that (4) + (3') is "a more appropriate description of the efficacy of a modern [legal] system" (Lagerspetz 1995: 171), especially if with regard to (3') we speak only about the majority of citizens in the majority of the cases and we interpret (4) in a relaxed way, probably only in a *justifying* reason sense. We shall come back to the question of the citizens' attitudes toward law in section 4.3.

4.2.3 Distinguishing emergence and compliance

Social norms and institutions raise at least two very general questions for social scientists: (1) how and why norms come into being, (2) why people comply with norms. In this paper we are mainly interested in the second question and we can thus rely on the results of research in this direction.[15]

These problems are not independent, however. Namely the second question is clearly related to such further problems as "how and when norms persist and change" and in this way it is also linked to the first question about the emergence. The link may be more direct if we try to explain norms and institutions as part of a *spontaneous order*, i. e. as unintended consequences of individual actions (see Barry 1982).

For the present purposes, it is interesting to see that the answer to (2) depends on how we explain (1). One such link is obviously the problem of *legitimacy*. Even from an observer perspective it is clear that if people ask (2) normatively: 'Are there good reasons to follow these rules?' the answer depends, at least in part on what they think about the origin and thus the authority of the rules: voluntary agreement, dictate, customary rule, etc.

The answer to (2) is arguably correlated to the answer to (1) also because there are different types of situations that tend to call for different types of norms. These norms, in turn, offer different reasons to follow them. These interrelated differences in situations, norms and reasons are clearly relevant for the problem of normativity, as well. We shall elaborate on this important topic in the next section.

4.3 Which game do we play?

Edna Ullmann-Margalit, in her famous book *The Emergence of Norms* (1977) gives an account of three types of strategic interaction situations where norms are susceptible to emerge. She assumes that every strategic situation can be classified as a combination of the three core or paradigmatic cases: (1) Prisoners' Dilemma situations, (2) co-ordination problems, (3) inequality/partiality situations. Even if this trichotomy is disputable, we follow her in viewing these situations useful in classifying norms. With due caution, we can do it also by speaking about the different *functions* of law. The

[14] Hart famously notes (1994: 114) about such a situation: "The society in which this was so might be deplorably sheeplike; the sheep may end in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system."

[15] Some philosophers argue that rational choice theory cannot really explain the origin of rules. Rules of a game are always exogeneous to the explanation because it has to rely on some previous rules and preference structure which are (considered) given (Kliemt, 1990: 73, 78–79). This might be true in a strictly logical sense, but as I see it doesn't rule out the possibility to construct medium-level theories with some exogeneous variables.

basic idea is that different functions (a) correspond to different game theoretic models, (b) provide different reasons for compliance, and thus (c) may explain normativity in different ways.

4.3.1 Interrelated differences in situations, norms and reasons

There are several important functions which the law serves in our society ("solving recurrent and multiple coordination problems, setting standards for desirable behavior, proclaiming symbolic expressions of communal values, resolving disputes about facts", Marmor 2001), probably without being one *essential* among them. For example in private law, especially contractual problems usually correspond to 2-person games, often repeated ones.[16] Public law is usually concerned with large-scale (n-person) collective action problems, which are one-shot in a game theoretical sense (i. e. due to anonymity without reputation effects, see Andreozzi 2002: 407–8). But in the enforcement, these problems are arguably to be modelled as 2-person games (Holler 1993, Frey and Holler 1999, Andreozzi 2002). Interestingly, in some situations law is supposed to *impede* co-operation and *maintain* Prisoners' Dilemmas, e. g. for cartels and certain types of corruption. Thus the uncritical identification of co-operative strategy in PD situations with moral behaviour is false. There are laws (antitrust rules) which aim to keep people in PD situations. From a legal policy (EAL3) perspective this means that in order to justify a legal change it is not sufficient to demonstrate that there is a PD situation, there has to be a reason to consider it "inappropriate", i.e. a problem waiting for legal solution.

To sum up, the different situations that law regulates can be modelled by different games and each has potentially a corresponding type of norm and a different typical reason or motivation for following the law. More importatly, if there is no *single* or *essential* reason to follow the rules of law, there cannot be a single explanation of its normativity. Thus we have to distinguish and characterise different types of cases. One useful typology (based on Ullmann-Margalit 1977 and Coleman 1990) is presented by Esser (2000: 56, 129–131).

Type of the norm	*Conventional*	*Essential*	*Repressive*
Structure of the problem	Co-ordination	Dilemma	Conflict
Relation of addressee and beneficiary	Conjunct	Conjunct or disjunct	Disjunct
Mechanism	Symbols	Morality	Dominance
Basis (Grundlage)	Interest, habits, practice	Shadow of the future, dependence	State, **law**, legitimacy
Guarantee	Convergence of interests	Sanction (internal, informal)	Sanction (external, formal)
Social process	Understanding, communication	Socialisation, internalisation	Social control

[16] For a brilliant indirect evolutionary model of law enforcement in a private law situation where courts also sustain trustwortiness, see Güth and Ochsenfels 2000. Applying an indirect evolutionary approach with endogenous preference formation, they show that a legal system can induce players to reward trust even if material incentives dictate to exploit trust. The model assesses how a court influences the share of kept promises of 'truly' trustworthy players who evolutionarily evolved as trustworthy and of opportunistic players who are only trustworthy if inspired by material incentives.

Adapted from Esser 2000: 130 (Fig. 5.5)

These three types of norm require an increasingly external guarantee and sanctions. The separate and genuine problem of legitimacy rises only for repressive norms, the other types of norms are legitimised by the interests the agents have in their validity. To be noted, this structural typology doesn't account for the emergence of norms in the strict sense. This poses a separate, second-order problem.
What this table says about law seems to be, at first sight, in conflict with the discussions above. But this contradiction can be solved, in part, if we keep in mind that the specificity of law is captured here by its ability to resolve conflict situations through repressive rules, which no other norm can do. Law is "the strongest weapon" among the three but it may and often actually does regulate the two other types of problem as well, which have different structures (Esser 2000: 56). In these cases there is a unilateral substitutability and a potential conflict between law and the other solution mechanisms (habit, morality) that the two first types of situation would minimally require. It should be noted that the table only points to the problem of legitimacy, without solving it – this applies consequently to the question of normativity of repressive law as well. But it makes clear again that if we want to understand the specificity of law (the nature of legal normativity), we have to concentrate on situations where what law requires does not coincide with habits or morality, i.e. non-legal norms.

4.3.2 Law as convention, law as co-ordination

There are several legal theories that seek to understand legal normativity from law's *conventional* nature. In their attempt, they increasingly rely on rational choice theory, in spite of the doubts about compatibility mentioned above. Thus, mainly influenced by the works of the philosophers David Lewis (1969) and Edna Ullmann-Margalit (1977) who in their turn relied on the results of Thomas Schelling (1960), legal theorists have begun in the last decades to use basic game theoretical concepts and models.[17] They seem to be especially concerned with co-ordination games and conventions in discussing the nature and main functions of law, including the problem of its normativity.

Still, there are at least three different senses in which this "law as co-ordination" paradigm has been used. In an order of decreasing generality these can be characterised briefly as follows:

1. Law (like paper money) is essentially conventional by its nature. The existence of law as a social phenomenon depends on mutual beliefs and expectations of people, it has no existence in a meaningful sense outside the mind of its subjects and officials. Without this mutual belief, the existence of law is inconceivable (Lagerspetz 1995: ch. 1, Ruiter 1993).

2. Law offers the solution to co-ordination problems by pointing at one equilibrium in the game. One of the most important functions of law is to determine (cf. the term *determinatio* in Aquinas) one of several equally possible and just (not unjust) arrangements of social affairs (Finnis 1989). In this way it may also offer a justification of law's authority (Gans 1983).

[17] For an overview see Special Issue 1998, Postema 1998.

3. Law is conceived as a complex system of strategic interactions that are essentially of co-ordinating nature (Postema 1982). More precisely, according to Postema there are three levels of co-ordination: among citizens (as in the point 2), but also between officials and citizens, and further between officials. The second level is especially important, because Postema attempts to ground the judges' obligation to obey the law in the conventional nature of the rule of recognition.[18]

The question whether law solves co-ordination problems in a game theoretical sense is partly a conceptual but partly an empirical question. For instance, it is highly controversial that the co-ordinative function of law is compatible with its coerciveness, let alone could justify or legitimise its use of coercion (Ullmann-Margalit 1983). If law is generally viewed as a co-ordinating authority, it is questionable whether it can justify coercion. As for co-ordination norms, there is an intrinsic reward in conformity to norms. Fear of sanctions, not to speak about moral commitment, has only a secondary rule beside self-interest.

The question is thus: if law is essentially founded on social conventions, how can this conventional practice give rise to reasons for action and to obligations? I shall argue that conventional rules cannot, by themselves, give rise to obligations.[19]

As we have seen in point 2, according to some theorists, conventional rules emerge as solutions to recurrent co-ordination problems. If the rules of recognition are of such a co-ordination kind, it is relatively easy to explain how they may give rise to obligations. Co-ordination conventions would be obligatory if the norm subjects have an obligation to solve the co-ordination problem that initially gave rise to the emergence of the relevant convention. This, however, may be true for co-ordination among officials, but definitely not true for citizens. It is namely hard to imagine how to ground this further obligation to solve the co-ordination problem.

But it is also questionable that co-ordination conventions are at the foundations of law as regard to the rule of recognition. In certain respects the law may be more like a structured game which is actually *constituted* by social conventions. Such constitutive conventions are not explicable as solutions to some pre-existing recurrent co-ordination problem, because the conventional rules constitute the game itself as a kind of social activity. The constitutive conventions partly constitute the values inherent in the emergent social practice. Such values, however, are only there for those who care to see them. And the existence of a social practice, in itself, does not provide anyone with an obligation to engage in the practice.

The rules of recognition only define what the practice is, and they can say nothing on the question of whether one should or should not engage in it. But once one engages in the practice, playing the judge, there are *legal* obligations defined by the rules of the game. The rules of recognition cannot settle for the judge, or anyone else for that matter, whether they should play by the rules of law, or not. They only tell the judges what the law *is*. The obligation to play the role may be grounded in independent moral reasons. And these reasons are most probably not the same as the reasons citizens have to obey the law.

[18] Following Hart, the rule of recognition is defined as social conventions which determine certain facts or events that provide the ways for the creation, modification, and annulment of legal standards. These facts, such as an act of legislation or a judicial decision, are the sources of law conventionally identified as such in each and every modern legal system (Hart 1994: ch. 6.1).

[19] Here again, I follow Marmor 2001. For the affirmative answer see Postema 1998, Special Issue 1998.

4.3.3 Coercion and conditional cooperation

On the other side, if the rationale of a great variety of legal arrangements can be best explained by the function of law in solving problems of opportunism and inefficiency (Prisoner's Dilemma situations) then the law's main role is, indeed, one of providing coercive measures. Still, even if law's functions are more closely related to its coercive aspect than Hart and Postema seem to have assumed (see section 3.3 above), we should refrain from endorsing Austin's or Kelsen's position that providing sanctions is law's only function in society.

As we have seen above, law fulfills very different functions in a modern society while Esser's characterisation of law by its potentially repressive nature has still some plausibility. Still it may be argued that if we have to single out one essential feature of law, we should better see it as having another, less dismal nature than repression, even if speaking about law in very general terms. It is often argued that the basic problem of social order (which Parsons called the Hobbesian Problem) can be modelled as a Prisoners' Dilemma. Now, PD norms turn these games into Assurance Games (Ullmann-Margalit 1977: 35) which represent a conditionally co-operative attitude. If we scrutinise Hobbes' writings other than *Leviathan*, it turns out that, in contrast to the usual interpretations Hobbes also agreed that the basic problem of how to sustain a social order among rational self-interested individuals is captured best by something like the Assurance Game (see Lagerspetz 1995, ch. 9). Thus, even if there is no single "essential" function for law, one of its most important functions is to serve as an instrument for sustaining conditional co-operation.

5. Sociology vs. Philosophy: Conclusions

Starting from the existing endeavours in EAL, I have summarised the impact of rational choice methods on legal theory in explaining the nature of law, and discussed the possible changes in EAL as a result from learning lessons both from recent game theoretical results and from legal theory as practical philosophy. There are still several questions left open.

Game theory and more generally, rational choice theory can be a useful tool both for sociology and philosophy. There are still questions that are inaccessible for or simply outside the scope of empirical sciences. The normativity of law, as a characteristic of human attitudes toward a system of rule and beliefs about the reasons for following these rules is evidently *not* such a question. In contrast, the normativity of law as part of a theory of *adjudication* is.

We can approve that Sen is right in saying that in a strictly logical sense when analysing law in a social scientific manner, there should not be an *a priori* bias toward (1) prudence against morality, (2) self-interest against altruism and (3) rationality against structural constraints. His view that evolutionary and reflective mechanisms are complementary is especially important (see Sen 1998: xii-xiii). But in my view (which I share with Max Weber, Jon Elster, John Harsanyi and others) he goes too far when concluding from the lack of logical priority that there is no methodological primacy either. Probably this is what Elster meant when saying that the rational-actor theory is prior to its competitors (norm-oriented and structuralist approaches), even though not necessarily more successful in each particular case (Elster 1984: viii-ix). The main

reasons for this are rather pragmatic: prudence, self-interest and rationality are simply convenient to be privileged as initial assumptions about human behaviour.[20]

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[20] This primacy also applies, *mutatis mutandis* to methodological individualism, supposedly in accord with Sen. In this respect Ullmann-Margalit uses even more "dramatic" arguments. She claims that we should assume that it is logically feasible to reduce theories about collectives to theories about individuals. There is no *a priori* reason to the contrary. So methodological individualism serves as a regulative idea of research. The merits of this reductionist programme lie, in her view, in counteracting the danger of reification, and if it is likely to be feasible, it is *ipso facto* worth wile (scientific *Selbstzweck*) (Ullmann-Margalit 1977: 16).

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